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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

NEW YORK TRUST COMPANY, AS TRUSTEE UNDER Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the cause between the above parties on December 26, 1933, with one judge dissenting, reversing an order of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 59–67)[1] is reported in 27 B.T.A. 1127. The majority

[1] The record references herein are to the record as printed in the Circuit Court of Appeals.

and dissenting opinions of the Circuit Court of Appeals are reported in 68 F. (2d) 19.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 26, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where property which was purchased in 1906 was given to a trustee in 1921 and sold by the trustee in 1922 is the gain on the sale taxable as a capital net gain under Section 206 of the Revenue Act of 1921, which defines "capital assets" as assets which have been held by "the taxpayer" for more than two years?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

The facts found by the Board of Tax Appeals (R. 61–62) may be summarized as follows: [2]

On April 27, 1906, Conrad Henry Matthiessen acquired 6,000 shares of the common stock of the

[2] The Board of Tax Appeals originally dismissed this proceeding for lack of jurisdiction (20 B.T.A. 162), but on the Government's appeal this order was reversed and the case was remanded for hearing on the merits. *Commissioner* v. *New York Trust Company*, 54 F. (2d) 463, certiorari denied, 285 U.S. 556.

Corn Products Refining Company at a cost of $141,375. This cost exceeded the fair market value of the stock on March 1, 1913. (R. 61.)

By an irrevocable deed of trust, dated December 24, 1921, Matthiessen transferred this stock to the present respondent in trust for his son, Erard A. Matthiessen, with remainders over in case of the death of the son. (R. 61–62.) On December 24, 1921, when the trust was created, the shares of stock had a total fair market value of $577,500. (R. 62.)

During the year 1922, the respondent sold the 6,000 shares of the common stock of the Corn Products Refining Company, which it held as trustee, for $603,385. (R. 62.)

In computing the profit realized by the respondent upon this sale, the Commissioner of Internal Revenue used as a basis the cost of the stock to Conrad Henry Matthiessen instead of its fair market value as of the date it was acquired by the respondent, and determined that this gain was not taxable as a capital gain under Section 206 of the Revenue Act of 1921 (*infra*, p. 7). On appeal to the Circuit Court of Appeals, that court, with one judge dissenting, sustained the Commissioner's determination as to the proper basis for computing the amount of the gain, but concluded that the gain was taxable as a capital net gain and not as ordinary income.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the gain from the sale of the stock by the respondent in 1922 was taxable as capital gain within the meaning of Section 206 of the Revenue Act of 1921.

2. The Circuit Court of Appeals erred in holding that the gain from the sale of the stock by the respondent in 1922 was not taxable as ordinary income.

3. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Johnson* v. *Commissioner*, 52 F. (2d) 726, and with the decision of the Court of Appeals of the District of Columbia in *Shoenberg* v. *Commissioner*, 55 F. (2d) 543. This conflict is recognized by the court below in its opinion. The decision is also in conflict with the consistent position of the Bureau of Internal Revenue (see I.T. 1660, II–1 Cumulative Bulletin 36; I.T. 1889, III–1 Cumulative Bulletin 70),[3] and with the decision of

[3] Following this administrative interpretation, Congress reenacted the statutory provisions in question in Section 208 of the Revenue Act of 1924 (U.S.C., Title 26, Sec. 939). The principle of *Brewster* v. *Gage*, 280 U.S. 327, and similar cases is, therefore, applicable.

the Board of Tax Appeals in *McKinney* v. *Commissioner*, 16 B.T.A. 804, and in the two cases above cited, in which the Board's decision was affirmed on appeal.

2. The decision below is erroneous. Section 206 of the Revenue Act of 1921 (*infra*, p. 7) provides for the taxation of gains from the sales of capital assets at 12½% instead of at the ordinary rates, and defines the term "capital assets" as

> property acquired and held by the taxpayer for profit or investment for more than two years * * *.

The statute plainly requires that the benefit of the lower rate applicable to capital gains cannot be taken unless "the taxpayer" has held the property for two years. In the present case the taxpayer was the trustee (*Anderson* v. *Wilson*, 289 U.S. 20); it had not held the property for two years at the time of the sale, and Section 206 does not apply. The language of the statute being clear and specific, there is no room for interpretation. *Ruggles* v. *Illinois*, 108 U.S. 526, 534; *Hyde* v. *Shine*, 199 U.S. 62, 78.

The law has subsequently been changed. Section 208 of the Revenue Act of 1926. But this change in the 1926 Act "can not authorize construction of the earlier one not consonant with the language there employed." *Russell* v. *United States*, 278 U.S. 181, 188. Moreover, the committee reports with respect to the 1926 Act indicate the intention to change the law. House Report No. 1,

69th Cong., 1st Sess., pp. 6–7; Senate Report No. 52, 69th Cong., 1st Sess., p. 18.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH 1934.

APPENDIX

REVENUE ACT OF 1921, C. 136, 42 STAT. 227, 232

SEC. 2. (9) The term "taxpayer" includes any person, trust or estate subject to a tax imposed by this Act;

* * * * *

SEC. 206. (a) That for the purpose of this title:

(1) The term "capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921;

* * * * *

(6) The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business), but does not include property held for the personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year.

(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected, and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and

in the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain; but if the taxpayer elects to be taxed under this section the total tax shall in no such case be less than 12½ per centum of the total net income. The total tax thus determined shall be computed, collected and paid in the same manner, at the same time and subject to the same provisions of law, including penalties, as other taxes under this title.

(c) In the case of a partnership or of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income and capital net gain, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership or estate or trust, and shall be taxed to the member or beneficiary or to the estate or trust as provided in sections 218 and 219, but at the rates and in the manner provided in subdivision (b) of this section.

U.S. GOVERNMENT PRINTING OFFICE: 1934